

Ventura County Star-Free Press and Printing Specialties and Paper Products Union, District Council #2 and News Media and Graphic Communications Union, Local 784, Graphic Communications International Union; and Graphic Communications International Union, Real Parties in Interest. Case 31-CA-13047-1

23 April 1986

DECISION AND ORDER

BY MEMBERS DENNIS, BABSON, AND
STEPHENS

On 28 October 1985 Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel and the Real Parties in Interest filed exceptions and supporting briefs, and the Respondent filed cross-exceptions, a supporting brief, and a brief in answer to the General Counsel's and the Real Parties in Interest's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. IV.A.2, par. 5 of his decision, the judge stated that International Printing and Graphic Communications Union Vice President William Torrance attended all the bargaining sessions Local 784 and the Respondent held. In fact, according to former Local 784 President Dennis Wagner's uncontradicted testimony, Torrance attended less than half of those sessions. According to Respondent Managing Editor Stan Whisenhunt's uncontradicted testimony, however, Torrance began attending bargaining sessions at least as early as the second session.

In sec. IV.B, par. 1, the judge discussed the Board's decision in *Amoco Production Co.*, 262 NLRB 1240 (1982) (*Amoco IV*), enf'd sub nom. *Oil Workers Local 4-14 v. NLRB*, 721 F.2d 150 (5th Cir. 1983), in which the Board held that all unit employees, whether union members or not, must be permitted to vote in a union affiliation election for the Board to find that the election procedures provided adequate due-process safeguards. In *NLRB v. Financial Institution Employees Local 1182*, 121 LRRM 2741 (1986), the Supreme Court recently held that the Board's *Amoco IV* rule exceeded the Board's authority. Application of the rule, however, was unnecessary to the judge's finding that the Respondent is estopped from challenging, and otherwise waived its challenges to, the Union's affiliation with International Printing and Graphic Communications Union. Consequently, we adopt the judge's finding for the other reasons the judge cited.

In sec. IV.B, par. 4, the judge erroneously referred to "Local 734," rather than Local 784.

² In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) and (1) by withholding step wage increases from its editorial department employees, we rely on Local 784's waiver of any right it may have had to bargain over the Respondent's withholding those increases by failing timely to demand bargaining. Accordingly, we find it unnecessary to pass on the judge's conclusions that the Respondent had a duty to continue paying step wage increases, and that the Respondent

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

would have violated Sec. 8(a)(5) and (1) had it unilaterally paid step wage increases 1 March 1983.

Homer T. Ball, Esq. and Charlene Martin, Esq., for the General Counsel.

Jeffrey A. Berman, Esq. (Proskauer, Rose, Getz, & Mendelsohn), of Los Angeles, California, for the Respondent.
Steven J. Kaplan, Esq. (Gilbert, Cooke & Sackman), of Beverly Hills, California, for the Real Parties in Interest.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based on an original and a first amended unfair labor practice charge, filed on April 21 and June 30, 1983, respectively, by Printing Specialties and Paper Products Union, District Council #2 (District Council) the Acting Regional Director for Region 31 of the National Labor Relations Board on August 26, 1983, issued a second amended complaint, alleging that the Ventura County Star-Free Press (Respondent) had engaged in unfair labor practices violative of Section 8(a)(1) and (5) of the National Labor Relations Act. Respondent timely filed an answer, denying the commission of any unfair labor practices. I presided at the hearing in this matter, held in Los Angeles, California, on April 23 through 25, 1984, and April 15 and 16, 1985. During the course of the hearing, I permitted all parties who appeared to examine and cross-examine all witnesses, to offer any relevant evidence, to argue their legal positions orally, and to file posthearing briefs. Each party filed such a brief, and all were carefully considered. Accordingly, based on the entire record, including my observation of the demeanor of the various witnesses and the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation duly organized under and existing by virtue of the laws of the State of California, with an office and place of business located in Ventura, California, where it is engaged in the business of publishing a newspaper of general circulation. In the course and conduct of its business operations, Respondent annually purchases and receives goods or services valued in excess of \$50,000 directly from suppliers located outside the State of California, annually carries national advertising in its newspaper valued in excess of \$5000, and annually derives gross revenues in excess of \$200,000. Respondent admits that it is an employer engaged in commerce, and in a business affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

Respondent admits that the following entities are labor organizations within the meaning of Section 2(5) of the Act: Ventura County Star Free Press Editorial Employees Association (EEA); the District Council; International Printing and Graphic Communications Union (IPGCU); and Graphic Arts International Union (GAIU).¹

III. ISSUES

The central issue is the allegation of the second amended complaint that Respondent has, since about March 1, 1983, and continuing to date, acted in violation of Section 8(a)(1) and (5) of the Act by unilaterally, and without first bargaining with the duly designated bargaining representative of its editorial department employees, changed the terms and conditions of employment of its employees by withholding step raises from individuals who were, and are, qualified to receive such wage increases. Arguing that it committed no unfair labor practices, Respondent's counsel contends that Respondent was under no duty to bargain with News Media and Graphic Communications Union (Local 784), International Printing and Graphic Communications Union, (Local 784), the entity resulting from an alleged affiliation of the EEA with the IPGCU, in March 1983;² that the step increases were never a term and condition of employment for the editorial department employees; that, in any event, in March 1983, Respondent could calculate neither the amounts nor the timing of such increases and, therefore, could not be required to offer step raises to employees; that Local 784 waived whatever rights it had to bargain over the withholding of these wage increases; that Respondent would have acted unlawfully if it had given step increases as it was engaged in bargaining with Local 784 in March 1983 over the subject of wages; and that, inasmuch as the merger between the IPGCU and the GAIU assertedly did not comply with Board standards, Respondent was, and is, under no duty to bargain with Local 784 as an affiliate of the GCIU.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. The EEA and affiliation with the IPGCU

Respondent publishes a newspaper in Ventura, California. At all times material, Julius Gius has been the editor and Stan Whisenhunt has been its managing editor. The record establishes that on November 21, 1969, the Regional Director for Region 31 certified the EEA as the

representative for purposes of collective bargaining of Respondent's editorial department employees and that thereafter the EEA, on behalf of its employees, negotiated a series of five collective-bargaining agreements with Respondent, the last of which was effective from March 3, 1980, until September 1, 1982. With regard to membership in this labor organization, it appears that the only requirement for such was employment in Respondent's editorial department. According to Robin Sjogren, who worked as a reporter for Respondent from 1979 until 1984, membership was "automatic. . . . As long as you were a nonmanagement employee, you were a member." The only requirement of membership was that an editorial department employee pay dues to the EEA on an annual basis. As to the internal structure of the EEA, such was established and memorialized by written bylaws, Respondent's Exhibit 4. According to this document and the testimony of witnesses, the organization had as officers a president, a vice president, a treasurer, and a secretary. The individuals in these positions were elected annually in October by the membership and thereby became members of the executive board of the EEA.³ The executive board was authorized to conduct all routine business of the organization; however, other matters, including the approval of final contracts or the expenditure of funds in excess of \$50, were subject to majority vote of the membership. Otherwise, membership meetings were held annually in October. Both Sjogren and Dennis Wagner, who worked as a reporter for Respondent from 1979 until 1983, testified that the EEA represented no other employees of Respondent and that only editorial department employees were members.

The record reveals that, commencing in the fall of 1981, "soon after Dennis Wagner was elected president," efforts were undertaken by the EEA to affiliate with another labor organization. According to Sjogren, during a series of membership meetings, affiliation was discussed, with the subject being "whether we wanted to continue as the EEA. . . . Most people expressed unhappiness with how the . . . bargaining . . . had gone . . . for the last contract, and there was general agreement that we needed to do something different this time." The discussions then moved into consideration of affiliation and "that we would have more clout because we'd have money, more members and professional advice" Wagner suggested a membership survey "to gauge interest in joining a larger union," and, as a result, the executive board was "directed" to begin investigating the entire subject. Subsequently, some members attended a meeting of employees of area newspapers that November in Santa Barbara. Also, in January 1982, the entire executive board met with representatives of the IPGCU and of the Newspaper Guild. After considering the options, the executive board recommended to the membership that the

¹ The parties stipulated that the record in another unfair labor practice proceeding, *Telegram Tribune Co.*, Cases 31-CA-12672, 31-CA-13047-2, and 31-CA-13052, which resulted in an informal settlement agreement dispositive of all issues, be incorporated into and made a part of the instant record insofar as the matter involves the merger between the IPGCU and the GAIU to form the Graphic Communications International Union (GCIU). Respondent contests the validity of the merger and denies that the GCIU is a labor organization within the meaning of Sec 2(5) of the Act.

² Respondent denies that Local 784 is a labor organization within the meaning of Sec 2(5) of the Act.

³ With regard to the duties of the officers, the president acted as chairman of the executive board and had "general supervision" over the affairs of the EEA, and the vice president acted in the absence or disability of the president. The secretary was charged with keeping records of all meetings, and the treasurer was charged with maintaining a financial account of all moneys of the EEA.

In addition to the officers of the labor organization, three other directors-at-large were elected annually to serve on the executive board.

EEA affiliate with the IPGCU, and, on February 4, a "straw vote" of the membership was taken, with a "large majority" voting in favor of affiliating. Thereafter, a general membership meeting was scheduled for, and held on, February 15 at Sjogren's home. She testified that notices regarding the time, date, location, and subject of the meeting were mailed to all editorial department employees, including the interns,⁴ who were not considered to be members of the bargaining unit. At the meeting, William Torrance, a vice president of the IPGCU, spoke to those in attendance regarding the matter of affiliating in general and about his labor organization in particular.

The record further reveals that, 3 weeks later, the EEA's membership voted to affiliate with the IPGCU. In this regard, Sjogren testified that all members were informed of the date and location of the vote "by written notice through the mail." The notice (G.C. Exh. 3), which was signed by Wagner, informed members that a meeting would be held at which they would cast ballots and that the purpose of the vote would be "whether to merge with the [IPGCU]" and that the meeting would occur at Sjogren's home at 5:30 p.m. on March 8. Wagner and Sjogren corroborated each other and testified without contradiction regarding the mechanics of the voting on March 8. Thus, 27 editorial department employees, including some interns, were at the meeting and participated in the vote.⁵ The meeting was held in Sjogren's living room with those in attendance sitting next to each other on chairs or on the floor. Before any ballots were distributed, the officers asked if anyone had questions or wished to discuss the subject of affiliation further. Thereupon, ballots, which consisted of unmarked pieces of paper torn from larger sheets, were distributed to everyone present. Concerning the procedure, Wagner stated, "I counted the ballots before I passed them out. . . . Then I passed them out. Then . . . [I] asked . . . 'Does everyone have a ballot?'" He further stated that the question on which the employees were to vote "was stated several times" by himself—whether the EEA would affiliate with the IPGCU.⁶ Concerning this, the voters were instructed to mark on their ballots either yes or no. Thereupon, the voters marked their ballots, and the pieces of marked paper were collected in a hat. Wagner and another employee, Sarah Riley, conducted the counting of the ballots, and the tally was unanimous, 27-0, in favor of affiliation. According to Wagner, he personally observed each ballot counted and believed each was marked yes. Finally, regarding the vote, no one present complained about the fairness of the voting procedures.

⁴ There is no dispute that Respondent's editorial department interns are usually students who had expressed an interest in journalism as a career. These individuals are assigned to do obituaries, copy editing, answer phones, and other reportorial duties. Although the EEA wished that these individuals were included in the bargaining unit, Respondent did not, and they were not covered by the several collective-bargaining agreements.

⁵ The record discloses that there were approximately 30 employees in the editorial department bargaining unit at the time.

⁶ Wagner conceded during cross-examination that employees did not vote on what form affiliation would take. However, he further testified that they were aware, from the meeting with William Torrance, that they would constitute a separate local within the IPGCU.

Immediately after the voting, Wagner informed William Torrance of the result and also dispatched a telegram to Respondent, informing it of the vote and of the result. Subsequently, Wagner, acting as president of the labor organization, formally applied, on behalf of the former EEA members, to the IPGCU for a charter as a local affiliate, and the IPGCU issued a charter, dated March 24, 1982, to the individuals as News Media and Graphic Communications Union Local 784, affiliated with the IPGCU. Thereafter, Wagner submitted membership applications, filled out and executed by the former EEA members, to the IPGCU, and the latter accepted the applications with the understanding that none of the former EEA members would be required to remit membership dues to the IPGCU until an initial collective-bargaining agreement was reached with Respondent. With regard to whether any change in the status of the editorial department employees' collective-bargaining representative resulted from the affiliation, the record discloses that the former EEA president, vice president, treasurer, secretary, and executive board members remained in those positions after affiliation; that, notwithstanding by joining the IPGCU, former EEA members became subject to that organization's existing constitution and laws, the EEA's bylaws remained the effective governing instrument of Local 784; and that, according to the uncontroverted testimony of Robin Sjogren, the only perceivable operational change was "that we were getting advice from the [IPGCU]"; however, the latter assumed no role over the day-to-day functioning of the local. As corroboration, Dennis Wagner testified that both before and after affiliation, the labor organization (EEA or Local 784) utilized no office staff, had no office, maintained its records at the homes of its officers, had the same bargaining procedures,⁷ maintained the same check writing privileges, and gave the identical duties and responsibilities to its officers. Further, the affiliation had no impact on the existing 1980 to 1982 contract, and the IPGCU committed to the EEA that it would exercise no veto over future collective-bargaining agreements between the new local and Respondent. Nonetheless, the record also discloses that affiliation with and membership in the IPGCU resulted in significant changes. Thus, unlike under the EEA's bylaws, the IPGCU constitution and laws established a formal internal disciplinary procedure, imposed some restrictions on an affiliated local's freedom to bargain, set forth a formalized strike procedure, and imposed greater financial obligations on members. Finally, Wagner testified that, subsequent to affiliation, Local 784 altered an EEA practice by seeking to organize Respondent's mailroom employees and by accepting as members those employees.⁸

⁷ As will be seen, the bargaining practice of the labor organization was changed to the extent of having Torrance present during the bargaining. However, Torrance did not establish the Local 784 bargaining positions, and his suggestions could be followed or vetoed by the bargaining committee.

⁸ Although it was uncontroverted that the EEA's bylaws remained the governing instrument for Local 784, Wagner admitted that the document was not followed at least in regard to the acceptance into membership of Respondent's mailroom employees. Thus, the bylaws require employment

Continued

An issue herein concerns Respondent's alleged acquiescence to the affiliation of the EEA with the IPGCU and to the naming of a new entity, Local 784, as the bargaining representative for its editorial department employees and whether, if such occurred, Respondent thereby waived its right to challenge the affiliation. In this regard, as stated above, Wagner notified Respondent of the result of the affiliation vote immediately afterward. As the existing 1980 to 1982 contract was due to expire on September 1, 1982, Cynthia Robinson, on behalf of Julius Gius, wrote to Wagner on June 11 that Respondent wished to commence negotiations for a new agreement, and on June 26 Wagner wrote a similar letter to Respondent, stating that the "News Media and Graphic Communications Union wishes to begin negotiations," and that "the News Media and Graphic Communications Union is a local composed of editorial employees at the Star Free Press. As you know, it was created earlier this year when the former Star Free Press Editorial Employees Association merged with the [IPGCU]." Notwithstanding the foregoing notice, there is no record evidence that Respondent challenged the efficacy of the affiliation at any time prior to the actual commencement of contract negotiations. In this regard, Dennis Wagner's testimony was uncontested that at the initial such meeting, held on October 13 at a Hilton hotel, Melvin Anderson, Respondent's bargaining spokesman, asked, "whether we were authorized to represent the employees as their bargaining agent," and demanded proof of such authority. Thereafter, at the parties' next bargaining session, held on October 22 at a Hilton hotel, Wagner showed Anderson the charter which was issued by the IPGCU to Local 784. On examining the document, "[Anderson] said that they accepted our position as the agent," and continued to bargain. After several more negotiating sessions and offers and counteroffers, according to Wagner, he received a telegram from Anderson about February 19, 1983. In the telegram, after characterizing Respondent's previous offer as its "best and last," Anderson stated, "In the event the Union would like to change its position in view of the unfortunate impasse in negotiations between the company and Local Number 784 of the [IPGCU] we require those written changes be forwarded to the company." Anderson was not called as a witness by Respondent to testify regarding this issue.

2. The alleged unilateral change

There is no dispute that, since, at least, March 1, 1983, Respondent has failed and refused to pay step raises to its editorial department employees who previously would have been eligible to receive such wage increases. Prior to discussing the facts underlying the allegation that this conduct constituted an unlawful unilateral change in the above employees' terms and conditions of employment, it is necessary to understand the dynamics of Respondent's raise policy as it existed under the newspaper's collective-bargaining agreements with the EEA during the period February 1971 through September 1, 1982. There

were five such contracts, and they all contain wage scales set forth in two columns, the left headed, "Experience Level" and the right headed, "Weekly Wages." Under the former column are listed six experience levels which refer to an employee's years of experience and training in the industry. Within its discretion, Respondent was contractually permitted to determine an individual's experience level at the time of hire; however, once the individual was given an experience level, he or she automatically advanced one level every year he or she worked for Respondent. The latter had no contractual authority to stop the process, and, in the words of Managing Editor Whisenhunt, "[I]t's pretty much out of my control once . . . they have passed that one-year level."⁹ An employee who achieves a 6-year experience level is classified as a journeyman. The right side column lists the weekly wage rate for the corresponding experience level. The record establishes that eligible employees received two types of raises—step raises and contractual pay date increases.¹⁰ Regarding the latter wage increases, each of the parties' five contracts specified dates on which employees received raises and the amounts of such. While the wage rates in each successive contract differed, the only variations of form in the successive contracts appear to involve the time intervals between the raises and how the pay dates were defined. Thus, the intervals between contractual raises range from 6 months to a year, and the pay raises dates are either established by reference to the effective date of the particular agreement (for example, as set forth in the 1976 to 1979 contract, "The following scale of wages shall be in effect one (1) year after the date [full and complete agreement is reached between the parties]") or, as in the March 3, 1980, to September 1, 1982 agreement, by specifying the day—September 1, 1980, March 2, 1981, etc. With regard to step raises, I note that, with the exception of the parties' most recent contract, there exists no mention of such wage increases in any of the preceding collective-bargaining agreements.¹¹ Nevertheless, there is no dispute that Respondent's practice during the parties' entire 11-year bargaining history was to pay such raises to bargaining unit employees when they achieved a new experience level. The parties stipulated that, from February 1, 1971, until February 29, 1980, the period encompassing the initial four contracts, bargaining unit employees received these step increases on the pay date closest to their anniversary dates and that from March 3, 1980, until September 1, 1982, the period of the most recent agreement, step raises were given to employees on the

⁹ A new hire, who was credited with less than 1 year of experience, must complete a full year of work before he or she is placed at the 1-year experience level. Thus, if a new hire is employed with 6 months' experience, he or she must work 6 months before achieving an experience level of 1 year.

¹⁰ In order to be eligible for both step raises and contract pay date raises, an employee must have been credited with between 1 and 5 years of experience. The parties stipulated that "Bargaining-unit employees who were credited with either less than one year of experience or more than six years of experience . . . received wage increases at the discretion of the Respondent."

¹¹ Whisenhunt testified that the concept of step increases was framed in the 1980 to 1982 contract. Prior to that, they were termed "anniversary increases."

in the editorial department as a condition of membership, and Wagner admitted that such was ignored in order to permit mailroom employees to become members.

contract pay dates immediately following their anniversary dates. In the former circumstance, the amount of the raise was established by the wage rate being paid to bargaining unit employees at the time, and in the latter circumstance, the amount of the raise was the new wage rate for individuals at the next experience level. Whisenhunt explained that the change of the dates on which the step raises were paid resulted from bookkeeping difficulties encountered by Respondent under the old system.¹²

Under the terms of the most recent agreement, the last scheduled date for the payment of step raises was March 1, 1982. Nevertheless, on August 30, Respondent gave raises to eight editorial department employees—Robin Abcarian, a reporter; Brian Burd, a photographer; Steve Devol, a reporter; Andrea James, a reporter; Jane Nolan, a reporter; Dennis Noone, a reporter; William Walker, a reporter; and Greg Zoroya, a reporter. Stan Whisenhunt, who was Respondent's official responsible for granting these wage increases, testified that, under article IV, section 4 of the 1980 to 1982 agreement,¹³ "I had the discretionary ability to give pay raises that were not specifically called for in the contract, and there were a number of people that I wanted to do something for before we got into negotiations and I might not have the ability to do so." Denying that the raises were step increases, the managing editor characterized what was given to each of the above individuals as a mere "pay increase." Contrary to Respondent, the General Counsel and the counsel for the Parties-In-Interest contend that the wage increases were step raises. Indeed, that is what the increases appear to be for some of the individuals. Thus, with regard to Burd, Devol, Nolan, Walker, and Zoroya, each had been given a step raise commensurate with reaching a higher experience level on August 31, 1981; each achieved a higher experience level on or before September 1, 1982; each would have been due a step increase about the date he or she actually received a raise if the existing contractual time intervals for the granting of wage increases was an established practice; and the

amount given to each individual was exactly what employees at the higher experience level were earning at the time.¹⁴ With regard to his wage increase, William Walker testified, "I was under the impression that it was a step increase, in that it was handled in the same manner as every step increase I had received. I was given a form to sign in triplicate indicating what my hourly rate was, what overtime rates were, and it was right at the time when my step wage increase should have taken place." He added, "My boss, Rita Moran, indicated that I was now at the three-year level." Moran, who is the people department editor and who, the parties stipulated, is a supervisor within the meaning of the Act, stated that she has no knowledge of employees' experience levels and denied telling Walker what his experience level was or anything regarding the nature of his raise.

Other record evidence also suggests that the raises which were given to Walker, Burd, Devol, Nolan, and Zoroya were, in reality, step increases. Thus, Robin Sjogren, who, as a member of Local 784's bargaining committee, was present at a contract negotiating session on January 5, 1983, at a Hilton hotel, testified that, during the meeting, she asked, "if we were going to be given step increases," and was answered by Whisenhunt, "No, there aren't going to be any more since the September one." She understood the managing editor to be referring to step raises. On direct examination, Whisenhunt recalled Sjogren asking him that day "before we really got into doing any negotiating . . . had any raises been given out since the contract had expired, and I answered no." However, on cross-examination, after denying that her question actually concerned the granting of step raises during the bargaining and on being confronted with his pretrial affidavit, Whisenhunt changed his testimony, admitting that Sjogren's question was whether or not step increases were given and that he answered, "not since September 1. . . . When the contract expired." Further, during another bargaining session, which occurred on May 4, 1983, at a Hilton hotel in Oxnard, according to Sjogren, step raises were discussed in great detail, with Local 784's negotiators arguing that Respondent had a legal obligation to continue granting these increases during the bargaining. At one point, Melvin Anderson asserted that the last contractually mandated step raises were given in March 1982 and that Respondent was operating under the contract during negotiations. Told that step raises had become an established past practice which Respondent was obligated to continue, Anderson replied that to give them would constitute a unilateral change. To this, Dennis Wagner responded that the newspaper had given step raises that past September and that such meant that Respondent "tacitly" accepted the Local's position. Sjogren testified that Whisenhunt interjected at that point, "he guessed he screwed up when he gave the September raises." Wagner corroborated this testimony,

¹² According to Whisenhunt, during the negotiations for the 1980 to 1982 contract, faced with Respondent's proposal to change the time for paying step increases, the EEA negotiators were concerned that five or six employees would lose money as a result. Accordingly, Respondent agreed to adjust the anniversary dates of the employees, who were most adversely affected, so that they qualified for step increases on an earlier contract pay increase date.

¹³ This contract provision reads as follows: "All other matters relative to the subject of wages not specifically outlined in this Article shall be determined at the sole option of the Employer," and similar language appeared in the prior contracts. Whisenhunt testified that he utilized this provision in two ways. First, he "did it when people were at the one-year level, because there's nothing in the contract," and he "did it above the six-year level, where there is a single figure." Second, he utilized the provision "where I would have employees who I felt were doing exceptionally well to give them what I would consider maybe a merit increase to increase their experience level." In this regard, the witness claimed that he adjusted the anniversary date of Dennis Wagner to give him a higher experience level in order to induce him not to accept a job offer elsewhere. Whisenhunt considered this a pay increase. Although Wagner did not deny this testimony, analysis of Jt. Exh. 16(dd), Wagner's payroll history, shows no adjusted anniversary date for the latter. Further, during cross-examination, Whisenhunt said, "I always had [the] discretion" to raise an employee from one experience level to another as long as such were approved by the "Editors," and "I suppose I could give discretionary raises anytime I wanted to." He admitted, however, that, under the last contract, he never did so.

¹⁴ Three of those individuals who received increases—Abcarian, James, and Noone—appear to either have been employees with less than 1 year of experience or have been employees with just 1 year of experience as of August 31, 1982. In any event, increases to them do not seem to be of the type associated with step increases.

stating that he and Anderson were discussing the continuation of step increases, with Anderson claiming that such were subject to negotiation and that to give them would be an illegal change. Asked, if so, why had step increases been given that past September, Anderson professed ignorance, and Whisenhunt said, "[Y]es, it was correct, that some had been granted step increases. . . . I screwed up." During his testimony, Whisenhunt, to an extent, corroborated what was said at that meeting, stating that someone accused him of giving raises the past September. Anderson said such had not been required, and "I said something to the effect, 'Well, I guess I fucked up, then.'"¹⁵

In my view, the matter of the alleged unlawful unilateral change must be analyzed in the context of the bargaining between the parties for a successor to the expired 1980 to 1982 contract. Both are inextricably intertwined, and one may not accurately assess the legality of Respondent's failure to pay step increases subsequent to March 1, 1983, unless the bargaining, particularly over the subject of wage increases, is likewise considered. In this regard, the record establishes that during the course of the negotiations, which consumed 11 meetings and 8 months, the parties exchanged several proposals and counterproposals on wage rates and raises and that, with the exception of a proposal announced on May 4 by Local 784's negotiating committee none of these bore any relation to the specificity and timing of wage increases under the recently expired agreement. Thus, Local 784's initial wage proposal, which was made at a bargaining session on November 19, 1982, states that "no employee shall . . . be deprived of any wages or benefits in existence prior to negotiations" and, rather than a yearly experience level wage scale, sets forth a 6-month scale (specified wage rates, for example, after the 2-year experience level and after the 2-year and 6-month level). According to Dennis Wagner, this initial proposal was for a term of 1 year. Although unclear, it appears that the proposed wage scale was to be effective on the signing of the agreement. Respondent made counterproposals at negotiating sessions held on December 8 and 22. Both the initial offer, which would have immediately increased the prior contract minimums by \$5 per week and incrementally increased the wage scale \$5 each succeeding 6 months, and the latter, which was identical except that \$10 increases were set forth, made the new wage scale effective "on the date that a full agreement is executed by the parties" and memorialized the practice that "step increases shall be payable on these contract pay increase dates." Wagner admitted that the local had no position about the effective date of the agreement at these meetings. During a bargaining session held on January 22, 1983, Local 784 modified its prior wage offer by reducing the proposed wage scale by \$10. Wagner testified

that such was meant to be effective on the execution of the new contract and admitted that the local's bargaining committee also proposed that step raises again be given on anniversary dates rather than on contract pay dates as under the expired agreement. Such was rejected by Respondent's negotiators Anderson and Whisenhunt.

Local 784 further reduced its wage proposal at a meeting on March 23, and in a communication to Julius Gius and Ron Spurr, Respondent's business manager, dated April 11, William Walker, who had been elected president of the Local the previous October, further altered the wage proposal, conforming the wage scale to what was then in existence and to what had been proposed by Respondent, seeking an immediate \$15 increase for employees at each experience level, and making the proposal effective on the signing of the new contract. Also, subsequent 6-month wage increases were tied to the effective date of the parties' agreement. Notwithstanding this proposal, when the parties next met to bargain on May 4, the Local 784 negotiators assumed a new position, one never previously expressed. Thus, there is no dispute that William Torrance, who had attended all the bargaining sessions as a member of Local 784's negotiating committee, announced at the outset, "Since we last met, we have learned that there's a legal obligation on the part of the Employer to continue step increases. . . . Therefore, we have to change our proposal and make it retroactive to September of 1982," and the contract would terminate in March 1984. After some arguing over the legality of Respondent's actions, Melvin Anderson professed annoyance that the local's new proposal was "more onerous" than presented in writing earlier and said he did not see how Respondent could continue bargaining with such a dispute as such would have a "major effect" on the amount of wages once final agreement was reached. The meeting soon ended, and there have been no further bargaining sessions between the parties.¹⁶

3. The IPGCU and GAIU merger

About July 1, 1983, the IPGCU and the GAIU merged to form the Graphic Communications International Union (GCIU). The validity of the merger, both in terms of fulfilling procedural due process requirements and maintaining the continuity of Respondent's editorial employees' bargaining representative, is at issue herein. In this regard, the record reveals that discussions between the two labor organizations, on the subject of merging, commenced in early March 1982 and that approximately a year later, about March 1983, the boards of directors of both approved the proposed merger agreement. Thereafter, copies of this document and other merger information were sent to each of the members¹⁷

¹⁵ The testimony of Whisenhunt was uncontroverted that there was a hiatus period between the parties' 1971 to 1973 and 1973 to 1976 contracts and that, while negotiating the latter, the EEA did not seek retroactivity back to the expiration date of the former. Whisenhunt added that one employee, Tom Hickey, had an employment anniversary date during the hiatus and was not given a step increase. No grievance was filed, and Hickey was given a step increase on the completion of negotiations for the new contract.

¹⁶ The record establishes that the following employees reached their next experience levels on or before March 1, 1983—Jim Bates (Feb. 2, 1983), John Cressy (Mar. 1, 1983), Kathy Garnica (Mar. 1, 1983), Craig Reem (Dec. 17, 1982), Robin Sjogren (Mar. 1, 1983), Dave Stone (Dec. 10, 1982), Dennis Wagner (Feb. 12, 1983), and Anne Zerrien (Mar. 1, 1983).

¹⁷ As of the dates of the merger election, the IPGCU and its affiliates had approximately 91,110 members eligible to vote, and the GAIU and its affiliates had approximately 101,000 members eligible to vote.

of both organizations,¹⁸ and the merger election was scheduled. Notice of the latter was contained in the March-April 1983 issue of *News and Views*, a publication of the IPGCU, and in the April 1983 issue of *Tabloid*, a publication of the GAIU. The record further reveals that the official merger election ballots were mailed to the local affiliates of both labor organizations, that the eligible members of the IPGCU voted on the proposed merger on May 11, and that the eligible members of the GAIU voted on the question on various dates from April 20 through May 27. Concerning the election results, regarding the IPGCU, approximately 63,101 votes were cast, with approximately 49,627 votes for and 13,474 votes against the merger, and, concerning the GAIU, 63,414 eligible members voted, with 43,872 votes in favor of and 10,286 votes against the merger. The merger was, therefore, approved¹⁹ and the GCIU established.

With regard to the editorial employees of Respondent, the overriding facts are that no election ballots were received by Local 784 and that no Local 784 member voted in the merger election. Initially, there is no question that members were aware of the proposed merger. Thus, not only were merger documents received in the mail by members or viewed at membership meetings but also William Torrance addressed the members at a meeting on the subject. According to William Walker, who was the president of Local 784 at the time, the subject also was raised at other membership meetings and discussed. Notwithstanding the importance of the matter, Walker stated, the attitude of the members was that they did not care—"the general consensus" was that "we would remain the same as we were." He traced this attitude to a remark by Torrance at the meeting at which he spoke; in response to a question regarding the consequences of the merger, the latter said the "status quo" would remain unchanged. Further, adding to this lack of concern were the then ongoing contract negotiations. According to Kathy Garnica, the merger then was a topic of conversation at meetings, "but the strongest recollection that I have of our discussions . . . was that everybody was saying, 'Oh, is that something we're going to have to do, we really like to work on the negotiations that's our number one priority.'" Torrance confirmed this, saying the Local 784 members "didn't seem very interested. They had more important problems of their own at that time." Evidence of this lack of concern is also seen in the fact that although knowing of the elec-

tion date from the IPGCU publications in that regard, no Local 784 officer bothered to contact any IPGCU representative to ask why no ballots had been received. The election date passed, and the editorial department employees learned the results the following month. According to Garnica, "I don't remember any concern voiced about not being able to vote." Regarding whether the merger of the IPGCU and the GAIU affected the representational status of Local 784, there is no evidence of any change in the structure of the Local in terms of its officers and directors or in their identities; there was no change in its operations; membership meetings and elections were, and are, held; the purpose of Local 784 remained unchanged—to represent the editorial department employees in bargaining; and there has been no change in the composition of the bargaining unit.

B. Analysis

In finding whether Respondent has engaged in any unfair labor practices by its conduct, I initially deem it necessary to determine the validity of the alleged affiliation of the EEA with the IPGCU. In this regard, a two-faceted test is utilized. As enunciated by the Board, "we [require] evidence that the membership action taken to effect the [affiliation] meets minimal standards for democratic procedures and that the [affiliation] insures to employees a continuity in their representation and organization." *Peco, Inc.*, 204 NLRB 1036, 1037 (1973). As to the former, or due process test, "the Board has consistently held that, while affiliation elections need not meet the standards the Board has enunciated for its own election proceedings, there are certain due process requirements which must be met in order to have a valid affiliation election." *Amoco Production Co.*, 262 NLRB 1240, 1241 (1982). Among the minimal requirements are that employees be given adequate notice of, and an opportunity to discuss the subject at, meetings prior to any action taken on affiliation and that the actual affiliation election be "conducted in an orderly fashion and in an atmosphere free from restraint or coercion." *Bear Archery*, 223 NLRB 1169, 1171 (1976), revd. 587 F.2d 812 (6th Cir. 1977). For such an election to have been conducted in an orderly manner, there must be adequate notice, the voting must be by secret ballot, some sort of record must be kept to ensure that the ballots counted represent "the legitimate votes of legitimate voters," and all bargaining unit employees, whether union members or not, must be permitted to participate and vote. *Amoco*, supra at 1241; *State Bank of India*, 262 NLRB 1108 (1982); *Steelworkers (L & S Products)*, 253 NLRB 961, 966 (1980). Respondent contends that the affiliation election, conducted in the living room of Robin Sjogren's house on March 8, 1982, did not provide due process to Respondent's editorial department employees inasmuch as no record was kept which employees voted; no "safeguards" were utilized to ensure that voters cast just one ballot; there was not an adequate count of the ballots; the secrecy of the voting was not protected; and interns were permitted to vote although not members of the bargaining unit. With regard to the continuity test, or whether there has been any change in the identity of the

¹⁸ Both Dennis Wagner and William Walker testified that they received the IPGCU's proposed merger documents. However, two other editorial department employees at the time, Gary Phelps, a photographer, and Dennis Noone, then a reporter and now the assistant city editor, denied receiving such documents in the mail or ever seeing them. Regarding whether the merger documents were available to Local 784 members for viewing, Kathy Garnica, a reporter and the present president of the local, testified that the proposed merger agreement document was distributed to those in attendance at a general membership meeting held between February and March at Robin Sjogren's house. Garnica also recalled receiving the merger documents in the mail.

¹⁹ As pointed out by counsel for the Respondent, the agreement for merger required that the proposed merger be approved "by a majority of the membership of each of the merging Internationals." Although a majority (53 percent) of the eligible members of the IPGCU approved the merger, less than a majority (44 percent) of the eligible members of the GAIU approved the merger.

employees' bargaining representative as a result of affiliation, the Board considers such factors as changes in the internal structure of the representative; changes in the identity of the elected officers of the representative; whether affiliation has any effect on the employment relationship, whether the representative retains effective control over bargaining, its daily operations, its staff, its monetary resources, and grievance handling; and whether all existing contractual commitments with the employer will be honored. *Aurelia Osborn Fox Memorial Hospital*, 247 NLRB 356 (1980); *New Orleans Public Service*, 237 NLRB 919 (1978); *Ocean Systems*, 223 NLRB 857 (1976). Herein, Respondent contends that the IPGCU constitution and laws dramatically changed what had existed under EEA's bylaws, thereby changing the identity of the employees' bargaining representative by imposing steeper financial obligations, an internal disciplinary procedure, controls over bargaining, and other new obligations on employees.

Although finding some validity to the assertion that the affiliation voting procedures may not have afforded employees the minimum process required by the Board, particularly regarding the secrecy of the balloting, I nevertheless conclude that by its conduct subsequent to the affiliation and chartering of Local 784 Respondent is now estopped from challenging the procedures utilized in the affiliation process. Underlying this conclusion is the uncontroverted testimony of Dennis Wagner that at the initial 1982 bargaining session Melvin Anderson, Respondent's main spokesman, demanded proof that Local 784 was the authorized bargaining representative of the editorial employees; that, at the next meeting, Wagner showed the Local 784 charter to Anderson; and that Anderson thereupon stated his acceptance of Local 784's status and commenced bargaining. Further, Respondent subsequently negotiated over an 8-month period with Local 784 and in a February 19, 1983 telegram to the latter, referred to an impasse in negotiations with it. Clearly, if Respondent entertained any doubts about the validity of the affiliation or the status of Local 784, it would not have so acted. Moreover, it seems apparent that the Local relied to its detriment on the failure of Respondent to place at issue its representational status until this proceeding. Thus, had Respondent challenged the affiliation on notification of the result of the election in March 1982, or had Anderson not accepted Wagner's proof of Local 784's status in October, the Local might simply have sought to amend the EEA's certification at those times rather than be confronted with a challenge to the validity of the affiliation as defense to alleged unfair labor practices at least 2 years later. In the foregoing circumstances, I believe Respondent is now estopped to assert that its March 1983 refusal to give step increases to eligible employees was somehow justified by procedural defects in the attempted March 1982 affiliation. *Knapp-Sherrill Co.*, 263 NLRB 396 (1982); *Gasland, Inc.*, 239 NLRB 611, 612 (1978). Further, contrary to counsel for Respondent, I find that its conduct likewise constitutes a waiver of its right to now challenge the affiliation. The Board defines a waiver as "the intentional relinquishment of a known right." *John J. Roche & Co.*, 231 NLRB 1082, 1095 (1977), *enfd. sub nom. Larkin v.*

NLRB, 596 F.2d 240 (7th Cir. 1979). Herein, Anderson's conduct at the initial bargaining session establishes that he was well aware of Respondent's right to question the affiliation, and his subsequent conduct reflects what must certainly be Respondent's position not only to accept Local 784's bargaining status but also to concentrate upon the substantive issues of bargaining. In this regard, it would be utterly naive to believe that Respondent would not have willingly entered into a contract with the Local had the latter accepted the former's offer on May 4, 1983. Therefore, the conclusion is justified, if not mandated, that Respondent thereby waived its right to question, at this time, the March 1982 affiliation. *Knapp-Sherrill*, *supra* at 397.

Having established that Respondent was, indeed, obligated to bargain with Local 784 representatives on expiration of the 1980 to 1982 collective-bargaining agreement between Respondent and the EEA, I turn now to consideration of the central issue herein—did Respondent violate Section 8(a)(1) and (5) of the Act by failing and refusing to pay step increases to employees, who reached new experience levels on or before March 1, 1983, without first giving notice to and bargaining with Local 784. Generally, "an employer violates its duty to bargain collectively when it institutes changes in employment conditions without notice to and bargaining with the exclusive collective-bargaining representative of its employees." *NLRB v. Katz*, 396 U.S. 736 (1962); *General Tire & Rubber Co.*, 274 NLRB 591 (1985). The initial issue, with regard to the alleged unfair labor practices, is whether the payment of step increases to editorial department employees who reach a new experience level constitutes a term and condition of their employment by Respondent. I have no doubt that such must be answered affirmatively. Thus, there is no dispute that, at least, since 1971 and as memorialized in the parties' most recent collective-bargaining agreement, Respondent's practice was to pay to its editorial department employees who had between 1 and 5 years of experience and who reached a new experience level a so-called step increase. While over the years the amounts of the increases, and the exact date on which eligible employees received them varied, the practice of paying these wage increases remained a constant factor in Respondent's employment relationship with its editorial department employees. To characterize the payment of step increases, as does counsel for Respondent in his posthearing brief, as something merely arising out of "employee expectations" is to trivialize what appears to have been an essential aspect of the above relationship. Accordingly, I find that the payment of step increases to eligible editorial department employees was, and remained, a term and condition of their employment by Respondent. Inasmuch as this practice was memorialized in the 1980 to 1982 collective-bargaining agreement, the applicable Board law is as follows: "The Board has held that an employer's duty to bargain over changes in established terms and conditions of employment is not relieved by the expiration of a collective-bargaining agreement. Although the expiration of a contract may permit an employer to negotiate new and different terms, it may not, absent an impasse or waiver by the union, unilateral-

ly change established practices with respect to mandatory subjects of bargaining." *Sacramento Union*, 258 NLRB 1074, 1075 (1981); *Stone Boat Yard*, 264 NLRB 981 (1983); *Struthers Wells Corp.*, 262 NLRB 1080 (1982). In other words, an employer has a duty to maintain in effect the terms of an expired collective-bargaining agreement and continue the "dynamic status quo." *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 8 (1st Cir. 1981); *Struthers Wells Corp.*, supra.

There is no dispute that commencing in March 1983 Respondent discontinued its practice, established over approximately 12 years of bargaining with the EEA and memorialized in their most recent collective-bargaining agreement, of giving wage increases to employees, with between 1 and 5 years of work experience, who achieve a new experience level. Nevertheless, analysis of the complex factual matrix herein convinces me that Local 784 effectively waived its right to bargain over Respondent's refusal to pay step increases, and I agree with the contention of Respondent's counsel in that regard. Regarding this, based on the concession/admission of Managing Editor Whisenhunt and the credited testimony of Robin Sjogren, who impressed me as being an honest and forthright witness, I find that at a negotiating session on January 5, 1983, at a Hilton hotel, the latter asked Whisenhunt if "we" (undoubtedly referring to editorial employees who had not received step increases since March 1982) were going to receive step increases and that the managing editor responded, "No, there aren't going to be any more." Whisenhunt's answer, I believe, constituted nothing less than notice to Local 784's bargaining representatives at that meeting of Respondent's intent to change the editorial department employees' terms and conditions of employment. Established Board law, with regard to asserted waivers in unlawful, unilateral change cases, "requires a union that has notice of an employer's change in a term or condition of employment to timely request bargaining in order to preserve its right to bargain on that subject." *City Hospital of East Liverpool*, 234 NLRB 58, 59 (1978); *Clarkwood Corp.*, 233 NLRB 1172 (1977). Therefore, I must conclude that at the January 5 bargaining session or certainly no later than at the meeting of January 19, in order to preserve its bargaining rights, it was incumbent on the Local's negotiators to exercise due diligence and request bargaining in order to attempt to dissuade Respondent from ceasing any future step increases. *American Buslines*, 164 NLRB 1055 (1967). Instead, Local 784's representatives stood mute on the subject on January 5 and for the next 4 months, a period encompassing two bargaining sessions and several wage proposals. During this time period, at least six editorial department employees achieved their next experience levels, became eligible for step increases, but were not given them. Yet, it was not until May 4 that Local 784 negotiators again raised the subject, on this occasion stating that they perceived such conduct as being unfair labor practices. This 4-month delay convinces me that payment of the step increases was not of paramount importance to Local 784. Rather, reaching a new contract was the primary concern and, as in 1973, the payment of step increases would follow such agreement. It was the contention of Respondent that their ne-

gotiations were at impasse that suddenly made the latter's failure to pay step increases about March 1 such an issue herein. Also, even if what was said by the Local's representatives on May 4 could be construed as a demand for bargaining over Respondent's refusal to give step increases—and I do not so conclude, such was clearly not a timely demand and exemplifies an utter lack of diligence. *Towne Plaza Hotel*, 258 NLRB 69, 77-78 (1981). What I believe is that Local 784 was merely protesting Respondent's failure to give step raises, and the Board has held that mere protests are not sufficient to place an employer in default; rather the labor organization must clearly signify to the employer its desire to engage in negotiations. *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979); *Clarkwood Corp.*, supra. Local 784 never so notified Respondent. Accordingly, by waiting until after Respondent had effectuated its unilateral changes and then merely contenting itself with protesting the conduct, Local 784 seemingly acquiesced in the changes²⁰ and clearly may not now effectively claim that Respondent unlawfully refused to bargain with it. *Towne Plaza Hotel*, supra; *City Hospital of East Liverpool*, supra.

Furthermore, I find merit to Respondent's contention that to have given step increases to eligible bargaining unit employees during the pendency of the negotiations with Local 784 may well have subjected the former to liability under Section 8(a)(5) of the Act. The central factor underlying this conclusion is my view that the timing of step increases was a crucial issue during the bargaining, and if Respondent had given the raises about March 1, 1983, it would have unilaterally, and prior to impasse, imposed a term and condition of employment, the timing of the step raises, on the editorial department employees.²¹ Thus, early March has significance herein only because certain of the contract pay dates in the 1980 to 1982 contract, the dates on which step increases were given, were specified as occurring then. In prior contracts, the contract pay dates were merely listed as intervals after the effective date of the parties' agreement. Notwithstanding the practice under the most recent contract, Local 784's wage proposals during the 1982-1983 bargaining, seemingly returned to the earlier practice and called for wage increases on the effective date of the agreement and at 6-month intervals thereafter. Not until May 4, 1983, or 2 months after the date upon which it is asserted that step raises should have

²⁰ I find acquiescence herein notwithstanding the filing of the original unfair labor practice charge on April 21, 1983. Thus, in *Citizens National Bank of Willmar*, the Board held that the union therein "cannot be content with merely protesting the action or filing an unfair labor practice charge over the matter." Supra at 390.

²¹ I believe this conclusion is warranted notwithstanding my further belief that what Managing Editor Whisenhunt gave to certain individuals on August 31, 1982, were step increases. Thus, noting the credible testimony of Robin Sjogren on this point, the admissions/concessions of Whisenhunt, and the fact that to the disinterested observer the raises appear to be step raises based both on their timing and the eligibility of the affected employees, I do not credit Whisenhunt's assertion that he was otherwise motivated in giving these wage increases. However, having so found, I also believe that the aforementioned conduct has significance only to the point of establishing that Respondent meant to continue the concept of step increases, a fact which does not seem to be at issue.

been paid, did the Local's representatives specify an effective date for the agreement, and even then, no exact dates were set forth as contract pay dates thereafter. Moreover, prior to the most recent agreement, step raises were paid on employees' anniversary dates rather than on the specified contract pay dates. As with no longer specifying the contract pay dates, Local 784 apparently reverted to its past practice on this during bargaining as Dennis Wagner admitted that the Local 784 negotiating committee proposed that step increases again be given on anniversary dates. Such establishes that both the setting forth of the contract pay dates and the timing of step raises were at issue during the bargaining, that the practices under the expired contract were not considered inviolate by the Local, and that as these factors were clearly at issue, Respondent would have acted unilaterally, without the existence of impasse, had it about March 1 given step increases during the bargaining—thereby subjecting itself to potential unfair labor practice liability.

Based on the foregoing and the record as a whole, I do not believe that Respondent may be found to have engaged in any unfair labor practices herein, and I shall

recommend that the instant second amended complaint be dismissed.²²

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The EEA, the District Council, the IPGCU, the GAIU, and Local 784 were, and are, labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any conduct violative of the Act, as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation²³

ORDER

It is recommended that the second amended complaint is dismissed in its entirety.

²² Based on my conclusions herein, I need not, and do not, make any findings about the validity of the merger between the IPGCU and the GAIU or the effect of same on the status of Local 784

²³ If no exceptions are filed as provided by Sec 102 46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102 48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.